

CORPORATE OBLIGATIONS UNDER THE RIGHT TO A HEALTHY LIVING ENVIRONMENT

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Abstract

In recent decades, globalisation has stirred up a number of positive and negative developments in national and international environments. An important feature of globalisation is the rise of the economic, social, cultural and political power of corporations. While corporate activities may positively contribute to the livelihoods of individuals, communities and societies, a number of allegations have been made that corporations have been involved in systematically violating human rights, including the right to a healthy living environment. In contrast, only a limited number of claims have successfully been brought against corporations or their directors and employees. This paper therefore examines the responsibility of transnational corporations to respect the right to a healthy living environment.

Keywords

Corporations, Globalization, Human Rights, Living Environment, Responsibility.

I. Introduction

Ogoniland is a region in the Rivers State in southern Nigeria covering 1,000 km, which has in past decades been subjected to systematic human rights violations. Ogoniland 'has been the site of oil industry operations since the late 1950s. Extensive production facilities were established during the following three decades. The operations were handled by the Shell Petroleum Development Company of Nigeria Limited (SPDC), under a joint venture agreement between the state-owned Nigerian National Petroleum Company (55% share), Shell/SPDC (30% share), Total (formerly Elf, 10% share) and Agip (5% share). SPDC is the operator of the joint venture.'² Amnesty International and Friends of the Earth International submitted a complaint on 30 December, 2011, against the Royal Dutch Shell group before the Dutch and UK National Contact Point under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises. The complaint submits that 'oil spills, waste dumping and gas flaring are endemic in the Niger Delta. This pollution, which has affected the area for decades, has damaged the soil, water and air quality. Much of the population in the oil producing areas of the Delta relies on fisheries, subsistence agriculture and associated processing industries for their livelihood,

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²Complaint to the UK and Dutch National Contact Points under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises 30 December 2011. See also Coomans (2003).

meaning that hundreds of thousands of people are affected by the pollution.³ Further, the complaint submits that ‘the findings of the UNEP report . . . clearly demonstrate that Shell has not taken due account of the need to protect the environment and public health. At a minimum, protection of the environment would require all reasonable action to prevent the pollution occurring (which Shell has failed to do) and to fully, properly and swiftly clean up the pollution (which the evidence shows Shell has also failed to do). Taking due account of public health would require some level of monitoring of the risks to health, particularly where the communities have raised concerns, yet UNEP’s report shows that the groundwater that people drink is polluted but had not previously even been monitored, and that people in Ogoniland are exposed to sustained pollution.’⁴

The situation in the Ogoniland is illustrative and opens a number of pertinent questions relating to corporate human rights obligations under the right to a healthy living environment. What happens when a corporation deprives individuals of a healthy living environment? Do corporations have normative obligations under the right to a healthy living environment? If so, what is the nature and scope of such obligations? This paper attempts to examine the corporate responsibility that derives from the right to a healthy living environment. The objective of this paper is to comprehensively demonstrate and analyze the existing scope and nature of corporate obligations deriving from the right to a healthy living environment. The general research question – do corporations have human rights obligations deriving from the right to a healthy living environment – underpins this paper. Even though corporate responsibility for human rights may be still in the embryonic stages, this paper attempts to argue that corporations, or alternatively their officers, are already obliged to observe the human right to the right to a healthy living environment as a part of a national and international value system.

Over recent decades, globalisation has stirred up a number of positive and negative developments in national and international environments. An important feature of globalisation is the rise of the economic, social, cultural and political power of corporations. While corporate activities may positively contribute to the livelihoods of individuals, communities and societies, a number of allegations have been made that corporations have been involved in systematically violating human rights, including the right to a healthy living environment. In contrast, only a limited number of claims have successfully been brought against corporations or their directors and employees.

Corporations play an important role in the realisation of the right to a healthy living environment and the rights of society as a whole. For example, they can become violators of the right to a healthy living environment where their activities deny access to clean and safe air and water. Corporations can have a positive or negative impact on the human rights of individuals, wider communities and indigenous peoples. Without doubt, a number of positive human rights initiatives have so far been undertaken by several corporations and a number of them contribute to the creation of jobs, the stimulation of economic growth and the raising of living standards.⁵

³Ibid.

⁴Ibid.

⁵See The Economist (2010), Jain, Vachani (2006), Business and Human Rights Centre (2012), or CSR Wire

This paper argues that corporations bear a certain responsibility for the realisation of the right to a healthy living environment, which can be derived from international as well as from national (constitutional) law. This paper argues that corporations have an obligation, deriving primarily from national legal orders, to respect, protect and fulfil the right to a healthy living environment. The author is fully aware that the primary responsibility for realising human rights lies with states and that recognizing the responsibility of corporations should never undermine this responsibility. However, given the powerful position that corporations increasingly possess, it is argued that corporations carry an additional responsibility under human rights law. This paper therefore examines the responsibility of transnational corporations to respect the right to a healthy living environment. The balance of this paper is devoted to exploring corporate human rights obligations under the right to a healthy living environment. The right to a healthy living environment is succinctly examined in section two. Section three analyses the legal nature and scope of corporate human rights obligations under the right to a healthy living environment and proposes *de lege ferenda* corporate human rights obligations under the right to a healthy living environment. By doing so it is possible to evaluate which arguments are convincing and determine what the sources and the legal nature are of corporate obligations under the right to a healthy living environment. To be clear, the argument here is that corporations have a responsibility deriving from the right to a healthy living environment.

II. Right to a healthy living environment

This paper argues that, at present, a substantive right to a healthy living environment has already been developed in national law, international law and in the voluntary commitments of corporations. Former Judge Weeramantry of the International Court of Justice noted in the *Gabčíkovo-Nagymaros* case that the ‘protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself.’⁶ More importantly, the Stockholm declaration notes that ‘man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.’⁷ The African Charter of Human Rights and Peoples’ Rights provides in Article 24 that ‘all peoples shall have the right to a general satisfactory environment favorable to their development.’⁸ The 1988 San Salvador Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights provides in Article 11 that ‘everyone shall have the right to live in a healthy environ-

(2008).

⁶*Gabčíkovo-Nagymaros* Project (Hung. v. Slov.), 1997 I.C.J. 7, 88 (Sept. 25), Separate opinion of Judge Weeramantry, 91.

⁷Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf.48/14/Rev. 1 (1973); 11 I.L.M. 1416 (1972), Principle 1.

⁸African Charter on Human and Peoples’ Rights, O.A.U. Doc. CAB/LEG/67/3/Rev. 5.

ment and to have access to basic public services.’⁹ Further, the Convention on the Rights of the Child provides in Article 24(2)(c) that ‘States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: . . . To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;’¹⁰ More importantly, the Office of the United Nations High Commissioner for Human Rights noted that ‘environmental damage can have negative implications, both direct and indirect, for the effective enjoyment of human rights’. In this regard, the human rights treaty bodies have addressed the environmental dimensions of the rights protected under their respective treaties, for example, in general comments, decisions concerning individual petitions and concluding observations. Similarly, regional human rights monitoring bodies and courts have clarified the environmental dimensions of protected rights, including the rights to life, health, property, private and family life and access to information.’¹¹ All in all, a fully-fledged implementation of the human right to a healthy living environment derives from both national and international law.

III. Corporate human rights obligations under the right to a healthy living environment: from their sources to their legal nature and scope

This section attempts to identify whether corporations have normative obligations under the right to a healthy living environment in national law, international law, and in corporate codes of conduct. It argues that the normative thrust of corporate obligations under the right to a healthy living environment derives from three levels of legal sources. First, it is submitted that corporate obligations under the right to a healthy living environment derive from national legal orders. Second, the corporate obligations may derive from the international level. Third, the corporate obligations under the right to a healthy living environment may derive from unilateral voluntary commitments by the corporations themselves. In other words, this paper argues that the corporate obligations under the right to a healthy living environment derive primarily from national legal orders and only secondarily from the international level, whereas both draw their foundations from a national and international value system, which in turn is derived from national legal orders. In addition, the voluntary commitments of corporations are identified as a third level of sources for corporate human rights obligations under the right to a healthy living environment.

⁹Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), OASTS No. 69 (1988) (signed 17 Nov. 1988) reprinted in 28 ILM 156 (1989), corrections at 28 ILM 573 and 1341 (1989), also reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 Doc.6, Rev. 1 at 67 (1992).

¹⁰Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990, 24(2)(c).

¹¹General Assembly of the United Nations (2011).

Legal sources of corporate human rights obligations under the right to a healthy living environment

Sources of corporate human rights obligations in national legal orders

The tenets of every normative system are principles and rules that create the rights and obligations of the subjects/participants in that system. The validity of any positive norm derives its legal authority from its membership in a legal order, which gives it its binding force. Legal authority means a source of law wherefrom a positive law norm is derived. Legal scholarship has so far predominantly focused on the international legal obligations of corporations.¹² In contrast, this paper argues that corporate human rights obligations derive legal authority from national normative orders and only secondarily from the international level. Finally, this section argues that the human rights obligations of corporations have arguably acquired the status of customary international law.

In the absence of a clear and coherent articulation of the positive international corporate human rights obligations relating to the right to a healthy living environment, it appears necessary to first examine the sources of corporate human rights obligations in national legal orders. This section argues that national legal orders are rooted more deeply in a normative system than international law is. This is not different in relation to corporate human rights obligations. A number of international human rights contained in the various international human rights treaties, or developed through customary international law, are directly enshrined in the national legal orders of several countries. Viljoen¹³ notes that ‘when states ratify human rights treaties, they undertake to domesticate and comply with their provisions.’ Having said that, it must be recognised that human rights protection was first developed in the domestic environment long before any international human rights treaty was adopted.¹⁴ Domestic laws include protection for human rights that can be enforced against corporations.¹⁵

The corporate human rights obligations under the right to a healthy living environment derive, as noted, legal authority primarily from national legal orders.¹⁶ Domestic laws have existed in many states, which place human rights obligations on corporations, including the right to a healthy living environment.¹⁷ The most important statutes are the constitutional laws. National constitutions often play a seminal role in the protection of human rights. Most commonly, all natural and legal persons must act in compliance with the laws of a national constitution. Most national legal orders include the protection of human rights preserving the security of persons, fundamental labour rights and protection against

¹²Ratner (2001), Jaegers (2002, see Declaration of C. Greenwood, Presbyterian Church of Sudan v. Talisman Energy Inc., Civil Action No. 1 CV 9882 (AGS) and Declaration of J. Crawford, Presbyterian Church of Sudan v. Talisman Energy Inc., Civil Action No. 1 CV 9882 (AGS)).

¹³Viljoen (2009).

¹⁴Magna Carta (1215), English Bill of Rights (1689), French Declaration of the Rights of Man and of the Citizen (1789), United States Declaration of Independence (1776).

¹⁵For a detailed discussion on human rights obligations in domestic law, see respectively Fitzgerald (2005), van Bijsterveld (2002), Joseph (2000), and Heyns, Viljoen (2002).

¹⁶See OECD (2006), noting that corporations are expected to comply with their legal obligations.

¹⁷See similarly Joseph (2004). See also Paust (2002), and Joseph (2007).

discrimination. These rights can arguably be translated into corporate human rights obligations under the right to a healthy living environment. In other words, the constitutional protection of human rights applies to both natural and legal persons.

A number of national constitutions of countries across the globe already include the human right to a healthy living environment.¹⁸ For example, India¹⁹, South Africa²⁰, and Nigeria²¹ (Anglophone common law countries), Vietnam²² and Haiti²³ (Francophone countries belonging to the civil law family), Portugal²⁴, Angola²⁵ (a Lusophone country belonging to the civil law family), Spain²⁶, Colombia²⁷, Brazil²⁸, and Chile²⁹ (Hispanic countries also belonging to the civil law family) China³⁰ and Slovenia³¹, all include numerous human rights in their national constitutions. What is more, Jeffords notes that ‘142 out of 198 national constitutions . . . include at least one reference to the environment as of 2010. Out of these 142 constitutions, 125 contain provisions that are explicitly related to environmental human rights, and ten include a direct human right to water.’³² It must be recognised, however, that only a few constitutions contain explicit provisions that the constitutional human rights of the right to a healthy environment apply to both natural and legal persons. Corporations are obliged to comply with obligations in national legal orders, which also include the protection of human rights.³³ In this regard, and as concerns national legislation, there are numerous examples of corporate human rights obligations deriving from national legal orders. A number of corporate human rights obligations derive from ordinary legislation in a number of national legal orders. Corporate human rights obligations under the right to a healthy living environment derive from ordinary criminal legislation, civil law legislation, consumer protection laws, company law, and national law covering the extraterritorial operations of corporations.³⁴

From this analysis of national legal orders, it becomes clear that a number of sources of law in national legal orders include corporate human rights obligations under the right to a healthy living environment. It appears that there is growing support for the notion that corporate human rights obligations under the right to a healthy living environment can be derived from constitutional protections and safeguards in ordinary legislations. In other

¹⁸Ksentini (1994).

¹⁹Constitution of India, part IV, arts. 48A and 51A.

²⁰Constitution of South Africa, section 29.

²¹Constitution of Nigeria, chapter II, Article 18.

²²Constitution of Vietnam, Articles 19, 20, 36.

²³Constitution of Haiti, Article 253 and 259.

²⁴Constitution of Portugal, Article 66.

²⁵Constitution of Angola, Article 9.

²⁶Constitution of Kingdom of Spain, article 45.

²⁷Constitution of Colombia, Articles 8, 49, 79, 80, 86, 88.

²⁸Constitution of Brazil, Article 225.

²⁹Constitution of Chile, Articles 11 (b) and 27.

³⁰Constitution of China, Article 9 and 26.

³¹Constitution of Slovenia, Articles 72 and 73.

³²Jeffords (2011).

³³See Ruggie (2011).

³⁴Ksentini (1994).

words, it has been argued that corporations must comply with the national constitutional and legislative protections of the right to a healthy living environment by way of complying with provisions of the positive law. From this perspective, it may be argued that corporate obligations relating to the right to a healthy living environment have arguably reached the status of the level of regional customary law, just as the substantive human rights obligations of corporations have arguably reached the status of regional customary law in Europe and possibly elsewhere in the world. This assertion has been backed by a number of national constitutions in Europe, Africa, the Americas, and Asia. Having gained an understanding of corporate human rights obligations deriving from national legal orders, the next part of this section turns to the development of the international human rights obligations of corporations.

Sources of corporate obligations under the right to a healthy living environment at the international level

This section argues that corporate human rights obligations under the right to a healthy living environment may secondarily derive from the international level. International law standards are the minimum standards which are agreed by and binding on the entire international community or part of it. Several international human rights treaties include state obligations to protect the right to a healthy living environment in relation to the activities of corporations. Against this background, a number of international and regional treaties providing for the right to a healthy living environment have been mentioned in section 2. Further, a number of arbitration tribunals have, in their decisions, indirectly recognised corporate obligations under the right to a healthy living environment.

Several commentators have argued that, despite the primary focus on states, corporations can have additional obligations under international human rights law.³⁵ As Ratner has observed, such an approach ‘confuses the existence of responsibility with the mode of implementing it.’³⁶ Articulating the direct human rights obligations of private actors, including corporations, should not depend on establishing a jurisdiction for implementing them. The recognition of the international human rights obligations of corporations cannot be subject to the (non-)existence of a potential international jurisdiction. Reading these international treaties together, Kamminga correctly notes that ‘there are no reasons of principle why companies cannot have direct obligations under international law.’³⁷ As noted, international treaties, however, bind only states. However, Clapham notes that it ‘makes sense to talk about the parties to a human rights treaty rather than use the expression states parties, which indicates that states are exclusive members of every human rights regime.’³⁸ In sum, the state of the art seems to be that – for now – ‘international law, as it exists today, includes norms that address the conduct of corporations and other non-

³⁵Clapham (2006), Jaegers (2002), Weissbrodt, Kruger (2003), Kinley, Tadaki (2004), Muchilinski (2007), Stinnet (2005).

³⁶Ratner (2001).

³⁷Kamminga (2004).

³⁸Clapham (2006).

state actors but, with very few exceptions, the norms do so by imposing an obligation on states to regulate non-state actors.³⁹ What remains clear is that international norms may have applicability to corporations if there is no international mechanism established for enforcing this norm.

The previous section on the right to a healthy living environment listed and briefly analyzed international treaties, which may include the right to a healthy living environment. However, the commitment of corporations to observe the right to a healthy living environment may also arise from soft law international documents. The preambular paragraph of the Universal Declaration of Human Rights (UDHR) stipulates: 'that the General Assembly proclaimed the Declaration as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society . . . shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance [. . .].'⁴⁰ The preambular provision is implemented in Articles 29 and 30 of the Universal Declaration. Article 29(2) articulates the correlative private duty that everyone has to respect the rights of others. Similarly, Article 30 provides that a 'group or person do not have any rights to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.' Reading the preamble, Henkin notes that: 'every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, and no cyberspace. The Universal Declaration applies to them all.'⁴¹ Undoubtedly, the language of the preambular provision includes the role of corporations in the promotion and the protection of human rights.

The 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Corporations and Other Business Enterprises with Regard to Human Rights, states that corporations 'shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development.'⁴² Further, the OECD 1976 Guidelines for Multinational Enterprises (last revised in 2011) requires multinational enterprises to 'contribute to economic, environmental and social progress with a view to achieving sustainable development.'⁴³

³⁹Vasquez (2005).

⁴⁰Universal Declaration of Human Rights (UDHR), Adopted and proclaimed by UN General Assembly Res. 217 A (III) of 10 December 1948.

⁴¹Henkin (1999).

⁴²See the UN Norms.

⁴³OECD (2001a).

Voluntary recognition of corporate obligations under the right to a healthy living environment

This section identifies a third potential layer of sources of corporate human rights obligations deriving from the right to a healthy living environment. It can be argued that these human rights obligations under the right to a healthy living environment may derive from unilateral voluntary commitments by corporations themselves. The voluntary commitments of corporations in human rights and the business field can most often be found in internal human rights policies or codes of conduct. The Organisation for Economic Cooperation and Development (OECD) defines codes of conduct as ‘commitments voluntarily made by companies, associations or other entities, which put forth standards and principles for the conduct of business activities in the marketplace.’⁴⁴

Codes of conduct are voluntary initiatives adopted by companies in order to improve their public reputations and to answer the demand that they take more responsibility for their activities. They include the normatively non-binding obligations/commitments of corporations. In other words, codes of conduct do not create legal, but at most moral, obligations.⁴⁵ They are drafted by corporations themselves because it is in their interests to adopt them. The codes of conduct include principles, standards or guidelines.⁴⁶ De Schutter notes that ‘they differ in their content by the monitoring mechanisms that they may or may not include, and by the level (the individual company, the sector, the country or group of countries) at which they are drafted and proposed for adoption.’⁴⁷ They may be specific or broad in their nature. The codes of conduct usually take principles and norms from the principles and rules of international human rights law.

A number of corporations have formally and publicly acknowledged responsibility for ensuring that their actions are consistent with the right to a healthy living environment. For the purposes of this paper, the human rights policies relating to the right to healthy living environment of some corporations are examined. For instance, Shell Corporation states in its General Principles that ‘Shell companies have a systematic approach to health, safety, security and environmental management in order to achieve continuous performance improvement.’⁴⁸ Pepsi Corporation notes in its Pepsi Guidelines in Support of the Human Right to Water where it ‘agrees . . . to ensure that our business engagement across the globe, first and foremost, respects the Human Right to Water.’⁴⁹ Similarly, the Coca-Cola Company emphasizes that: ‘our commitments are focused where we have the most opportunity to make a difference – water stewardship, sustainable packaging, energy

⁴⁴OECD (2001b). See MacLeay (2005).

⁴⁵Bernaz, Morin (2006).

⁴⁶See, for example, Murphy (2005), Baker (2007).

⁴⁷de Schutter (2005). See also OECD (1999).

⁴⁸Shell General Business Principles, http://www-static.shell.com/static/aboutshell/downloads/who_we_are/sgbps/sgbp_english.pdf.

⁴⁹Pepsi Guidelines in Support of the Human Right to Water, <http://www.pepsico.com/Purpose/Environment/Water.html>.

management and climate protection.⁵⁰ It notes that ‘across the Coca-Cola system, we recognize that climate change may have long-term direct and indirect implications for our business and supply chain. As a responsible multinational company, we have a role to play in ensuring we use the best possible mix of energy sources, improve the energy efficiency of our manufacturing processes, and reduce the potential climate impact of the products we sell.’⁵¹ The Kellogg Corporation states that ‘promoting and maintaining environmentally responsible practices is beneficial for everyone – our customers, consumers, employees and the communities in which we operate. At Kellogg Company, we take seriously our commitment to the environment. We conduct our business in ways that protect the environment and demonstrate good stewardship of our world’s natural resources. We work closely and cooperatively with local communities, suppliers and contractors, government agencies, and other organizations engaged in improving the environment. And we continually seek new ways to address the environmental cost and impact of our activities, products and services.’⁵²

While it is correct that voluntary initiative codes of conduct have never worked to alter corporate behaviour, they can nonetheless contribute to some extent to the corporate observance of human rights.⁵³ This paper therefore argues that the voluntary commitments represent the third and additional layer of corporate obligations. Codes of conduct of corporations are essential in promoting compliance with human rights obligations amongst corporations and they offer the often required balance between normative protections and voluntary corporate social responsibility. Corporate codes of conduct also have a number of weaknesses. They are often vaguely defined and include only some human rights, whereas other human rights are omitted. In addition, most of them do not support the mechanisms and independent monitoring of their implementation. It may appear that they can be described as *lex imperfecta*. It is clear, however, that codes of conduct do not have the same normative value as the first two levels of sources of human rights obligations under the right to a healthy living environment. They nonetheless provide an additional layer from which derives the corporate commitment to observe the right to a healthy living environment. Identifying corporate human rights obligations under the right to a healthy living environment is a large exercise, of which the voluntary commitments of corporations are only a small but important part.

Interim conclusion

International law and national legal orders are two autonomous legal orders joined in a coherent pluralistic whole. This section has argued that corporate obligations under the right to a healthy living environment derive primarily from national legal orders, and

⁵⁰The Coca-Cola Company, Environmental Initiatives, <http://www.thecoca-colacompany.com/citizenship/environment.html>.

⁵¹The Coca-Cola Company, Position Statement on Climate Protection, http://www.thecoca-colacompany.com/citizenship/ecp_climate_position_statement.html.

⁵²The Kellogg Corporation, Kellogg and the Environment, <http://www.kelloggcompany.com/social.aspx?id=65>.

⁵³See, for example, Waagstein (undated).

alternatively from an international law level. Taken together, national legal orders and international systems impose human rights obligations on corporations. In addition, voluntary commitments may offer further evidence of such obligations. In this light, sources of corporate human rights obligations under the right to a healthy living environment should be treated as mutually complementary and not as mutually exclusive. Even though the precise content of the human rights obligations of corporations is somewhat unclear, it may appear self-evident that corporations are asked to at least comply with fundamental human rights standards, including the human right to a healthy living environment. Therefore, the development of substantive human rights obligations under the right to a healthy living environment may require a translation of already existing national human rights standards into a corporate context.

The nature and the scope of corporate obligations under the right to a healthy living environment

This section argues that corporations have obligations to respect, protect and fulfil the right to a healthy living environment.⁵⁴ This section first examines a tripartite typology of human rights obligations.⁵⁵ The former UN Special Rapporteur on the Right to Food, Asbjørn Eide, introduced the tripartite typology, and distinguished state obligations for economic, social and cultural human rights at three levels: the obligations to respect, protect and fulfil human rights.⁵⁶ He built his doctrine upon the earlier writings of Henry Shue, who first developed the typology of obligations in his book *Basic Rights – Subsistence, Affluence and U.S. Foreign Policy*, where he distinguishes three types of duties: ‘duties to avoid *depriving*, duties to *protect* from deprivations and duties to *aid* the deprived.’⁵⁷ This paper attempts to argue that the tripartite typology could also be employed in relation to corporate human rights obligations under the right to a healthy living environment. The tripartite obligations to respect, protect and fulfil human rights apply universally to all rights and entail a combination of negative and positive duties.⁵⁸ However, the fact that the state is the bearer of human rights obligations does not imply that only the state has

⁵⁴See, for example, Yusuf (2008), arguing that corporations should be similarly obligated to respect, promote and protect human rights.

⁵⁵For a detailed discussion on tripartite human rights typology, see Sepulveda (2003), Eide (1989, 1999 (updated study on the right to food, submitted in accordance with Sub-Commission decision 1998/106, UN Doc E/CN.4/Sub.2/1999/12)). See also Koch (2005).

⁵⁶Eide published two interim reports (UN Docs E/CN.4/Sub.2/1983/25 and E/CN.4/Sub.2/1984/22). In 1987 he submitted his final report (UN Docs E/CN.4/Sub.2/1987/23). Scott (2001).

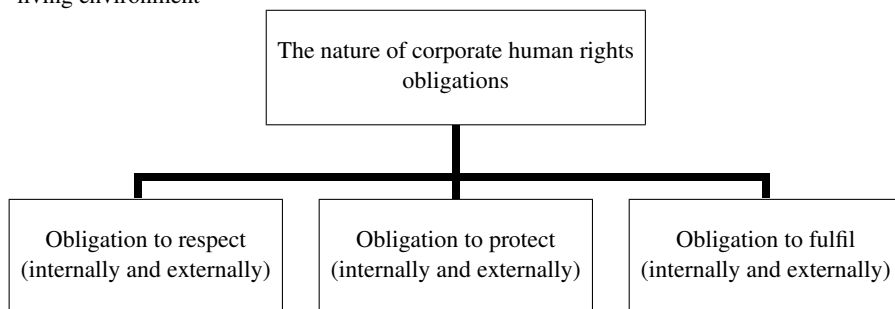
⁵⁷See Shue (1980). See also Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 22–26 January 1997, and General Comment 12 of the UN Committee on Economic, Social and Cultural Rights, 12 May 1999.

⁵⁸African Commission on Human and Peoples Rights when interpreting African Charter for Human and Peoples’ Rights developed four-fold typology of human rights obligations in the case of *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* (Communication 155/96, 27 May 2002). It held that ‘internationally accepted ideas of the various obligations engendered by human rights indicate that all rights – both civil and political rights and social and economic – generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfill these rights.’.

such obligations. Shue noted in this regard that ‘for every basic right – and many other rights as well – there are three types of duties, all of which must be performed if the basic right is to be fully honoured but not all of which must necessarily be performed by the same individuals or institutions.’⁵⁹

Tripartite obligations to respect, protect and fulfil the right to a healthy living environment can apply also to corporations.⁶⁰ Eide confirms this point by writing ‘it should be kept in mind that all members of society share responsibility for the realization of human rights.’⁶¹ The UN Norms for Corporations suggest that corporations are obliged to respect, protect and fulfil human rights norms within their spheres of activity and influence.⁶² They cover a wide area where corporations exercise their influence.⁶³ Therefore, the tripartite typology can also be used as an analytical tool to examine and investigate the nature and the scope of the human rights obligations of corporations. Figure 1 attempts to offer, graphically, an illustration of the nature and scope of corporate human rights obligations under the right to a healthy living environment.

Figure 1 The Nature and Scope of corporate human rights obligations under the right to a healthy living environment



Having briefly described the tripartite typology of human rights obligations and the general nature of the human rights obligations of corporations, attention will now be turned to an analysis of each limb of the tripartite human rights obligations of corporations: obligations to respect, protect and fulfil the right to a healthy living environment.

The corporate obligation to respect

The obligation of corporations to respect the right to a healthy living environment means that corporations are obliged to refrain from interfering with the enjoyment of the human rights of others. In other words, it is an obligation to do no harm to the enjoyment

⁵⁹Shue (1980).

⁶⁰For detailed discussion, see Jaegers (2002), Clapham (2006).

⁶¹UN Doc. E/CN4/Sub.2/1987/23, 7 July 1987.

⁶²See the UN Norms.

⁶³Kinley, Tadaki (2004), Weissbrodt, Kruger (2005), General Assembly of the United Nations (2011).

of environmental resources of others. This rule derives from the ancient Roman law principle *sic utere tuo ut alterum non laedes*. According to Eide, the obligation to respect ‘requires the State, and thereby all its organs and agents, to abstain from doing anything that violates the integrity of the individual or infringes on his or her freedom, including the freedom to use the material resources available to that individual in the ways she or he finds best to satisfy basic needs.’⁶⁴ For corporations, the obligation to respect human rights implies that its corporate activities refrain from interfering with or violating the rights of people.⁶⁵ The Guiding principles on Business and Human Rights recognize in subsection b of their general principles that ‘the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights.’⁶⁶ The Guiding principles further note in paragraph 12 that that corporations ‘should respect human rights, which means to avoid infringing on the human rights of others and to address adverse human rights impacts they may cause or contribute to.’⁶⁷ The Commentary to paragraph 13 argues that corporate ‘responsibility to respect applies to all’ ‘internationally recognized human rights.’⁶⁸ The Joint Committee of the House of Commons correctly noted that ‘the responsibility on businesses to respect human rights is not merely voluntary.’⁶⁹ In short, corporations are obliged to respect fundamental human rights.

The obligation to respect may appear to suggest that companies have to undertake due diligence, ensuring not only that they comply with human rights obligations under the right to a healthy living environment, but also that they do everything possible to avoid causing harm.⁷⁰ In this regard, one commentator has suggested that a company’s obligation to respect and protect the right to a healthy living environment of its employees implies taking reasonable steps to protect workers from violations committed by the State, or to seek legal redress for their employees if violations have been committed.⁷¹ Corporate obligations to respect human rights to the right to a healthy living environment extend beyond the sphere of employees to all individuals affected by corporate activities.⁷² Corporate responsibility and corporate obligations to respect human rights have been recognised in a number of international documents and also within the United Nations.⁷³ The measures that corporations could adopt to ensure respect for the right to a healthy living environment in their activities include: acknowledging the right to a healthy living environment in their policies, constantly and consistently examining human rights situations in countries where a corporation operates, or intends to do so; effectively monitoring supply chains by drafting explicit policies that protect the human rights of the corporation’s

⁶⁴UN Doc. E/CN.4/Sub.2/1987/23, 7 July 1987, see also Jaegers (2002).

⁶⁵Frey (1997).

⁶⁶Ruggie (2011).

⁶⁷Ibid.

⁶⁸Ibid.

⁶⁹House of Commons (2009).

⁷⁰Ruggie (2008).

⁷¹Clapham (2006).

⁷²Jaegers (2002).

⁷³Ruggie (2008).

employees and workers throughout its supply chain; implementing a monitoring system to ensure that human rights policies relating to the right to a healthy living environment are being implemented; and adopting explicit policies to ensure that the corporation's security arrangements do not contribute to human rights violations of the right to a healthy living environment.⁷⁴ The next section discusses the corporate obligation to protect the right to a healthy living environment. It must be noted, however, that the obligations to respect and to protect function simultaneously and are complementary.

The corporate obligation to protect

The obligation to protect the right to a healthy living environment includes the obligations of corporations to protect the individual's enjoyment of the right to a healthy living environment and to support the protection of the right to a healthy living environment by employing its expertise and resources to protect the right to a healthy living environment of individuals and local communities.

Corporate obligations to protect the right to a healthy living environment have both an *internal* and an *external* dimension. Protection must be offered against the activities of a parent corporation, subsidiary corporations and its business partners. Corporations have obligations to protect the right to a healthy living environment of persons internally in relation to their own activities. On the other hand, the obligation to protect the right to a healthy living environment includes also an external obligation, which requires a corporation to take necessary measures to protect the integrity and human rights of individuals in relation to its business partners.⁷⁵ For instance, the UK OECD National Contact Point noted in *Global Witness v Afrimex* that 'the UK Government expects British companies to exercise the highest levels of due diligence in situations of widespread violence and systematic human rights abuse, such as that which prevails in Eastern DRC.'⁷⁶ In this way, it urged 'UK companies to use their influence over contracting parties and business partners, when trading in natural resources from this region, to ensure that due diligence is applied to the supply chain.'⁷⁷ In other words, an obligation to protect the right to a healthy living environment would denote that corporations are obliged to adopt internal regulations and take other measures to prohibit and prevent human rights violations *internally*, in their own activities, but also *externally*, in business relationships with third parties (subsidiaries, contractors, sub-contractors and business partners) throughout their supply chains.⁷⁸ Similarly, Clapham suggests that corporations have the 'duty to ensure that the contractors with which they do business are complying with the Norms'.⁷⁹ He argues that the obligation to protect exists 'even if... threats do not derive from the

⁷⁴Ibid.

⁷⁵Clapham (2006).

⁷⁶Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises on Afrimex (UK) Ltd., 28 August 2008.

⁷⁷Ibid.

⁷⁸International Commission of Jurists (2008).

⁷⁹Clapham (2006).

corporation itself'.⁸⁰ It appears, therefore, that the corporate obligation to protect the right to a healthy living environment extends much further than the obligation to respect. The obligation to protect is relevant particularly in the relationship of a corporation with third parties.⁸¹

It appears that corporations are under an obligation to ensure that their business partners comply with basic standards in relation to the right to a healthy living environment. Even more so, corporations can assist the state government in effectively respecting, promoting and fulfilling human rights. If corporations contribute to the protection of human rights, this will also strengthen regulatory mechanisms for the protection of human rights.⁸² In this vein runs the Commentary of the UN Norms that corporations should 'initially work with perpetrators to reform or decrease violations'.⁸³

The obligation to protect the human right to a healthy living environment requires that measures taken by corporations, and passive commitments 'not to do any harm', do not suffice. Corporations must adopt internal monitoring mechanisms aimed at monitoring and regulating the behaviour of the actors with whom they have business relationships. Several corporations recognise the obligation to protect human rights within their activities. Shell, for example, notes that 'operating companies . . . have a responsibility to identify existing and potential human rights issues which may arise in their area of operations'.⁸⁴ Similar provisions can be found in the codes of conduct and internal human rights policies of British Petroleum⁸⁵, Chevron⁸⁶, Citigroup⁸⁷, Coca-Cola⁸⁸, Exxon Mobil⁸⁹, Total⁹⁰, General Motors⁹¹, Wal-Mart⁹², Conoco-Philips⁹³, Daimler-Chrysler⁹⁴ and De Beers⁹⁵.

⁸⁰Ibid.

⁸¹Jaegers (2002).

⁸²Ibid.

⁸³See the UN Norms, Commentary.

⁸⁴Shell, Business and Human Rights, A Management Primer, http://www.shell.com/static/envirosoc-en/downloads/management_primers/business_and_human_rights_primer.pdf.

⁸⁵British Petroleum, Human rights: A guidance note, http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/BP_Human_Rights_2005.pdf.

⁸⁶Chevron Corporation, Human Rights Statement, <http://www.chevron.com/globalissues/humanrights/>.

⁸⁷Citigroup, Statement on Human rights, <http://www.citigroup.com/citigroup/citizen/humanrights/data/index.htm>.

⁸⁸Coca-Cola Human Rights Statement, http://www.thecoca-colacompany.com/citizenship/human_rights_statement.html.

⁸⁹Exxon Mobil, http://www.exxonmobil.com/Corporate/community_local_rights.aspx.

⁹⁰Total Corporation, Code of Conduct, <http://www.ccponline.com/pdfs/TOTAL%20Code%20of%20Conduct.pdf>.

⁹¹General Motors, <http://www.gm.com/corporate/responsibility/reports/00/vision/social/human.html>.

⁹²Wal-Mart, requirements for suppliers, <http://walmartstores.com/Suppliers/248.aspx>. See Equal Opportunity Practices.

⁹³Conoco-Philips Corporation, Human Rights Position, http://www.conocophillips.com/social/values_policies/humanrights/index.htm.

⁹⁴Daimler-Chrysler, <http://www.daimler.com/dccom/0-5-880434-1-881989-1-0-0-0-0-0-8-876574-0-0-0-0-0-1.html>.

⁹⁵De Beers Group Community Policy, http://www.debeersgroup.com/ImageVaultFiles/id.1948/cf_5/Community_Policy.PDF.

The Corporate obligation to fulfil

The third category of corporate human rights obligations under the right to a healthy living environment includes the obligation to fulfil the right to a healthy living environment. The Commentary of the UN Norms suggests that corporations ‘shall further refrain from activities that would undermine the rule of law as well as governmental and other efforts to promote and ensure respect for human rights, and shall use their influence in order to help promote and ensure respect for human rights.’⁹⁶ It may appear that the corporate obligation to fulfil requires corporations to formulate, implement and periodically review a coherent human rights policy to lessen the risk of human rights violations throughout the entire corporate structure.

A corporation may become the primary holder of an obligation to fulfil the right to a healthy living environment foremost in failed states, where there is no efficient governmental control or authority. Another situation may occur when corporations operate in territory where the state is unable to fulfil the rights of the people living there. However, states are and should be primarily responsible for their obligation to fulfil. It is true, however, that corporations may have a secondary responsibility towards society that reinforces their obligation to respect and protect human rights. The size of and available resources of a corporation will play a large role in meeting the standards of the obligations to fulfil.⁹⁷ While the resources available for fulfilling human rights obligations may not be as plentiful in small corporations as in large corporations, corporations may adopt such policies to the maximum of their available resources.

Corporate obligation under the right to a healthy living environment *de lege ferenda*

Returning to the illustration at the start of this paper, this section attempts to identify the obligation relating to the right to a healthy living environment a corporation would have in the Ogoniland. Assuming that corporations have some obligations to observe the right to a healthy living environment, the following tri-partite obligations of corporations to ‘respect, protect and fulfil’ the right to a healthy living environment can be identified:

Obligations to respect – corporations are to refrain from:

Internal obligations:

- taking measures that negatively affect the right to a healthy living environment.,

External obligations:

- taking measures that negatively affect the right to a healthy living environment with regard to the environment and health of communities;
- the production and marketing of products that are detrimental to clean air and clean and safe water;
- complicity in violations of the right to a healthy living environment.

⁹⁶UN Norms, Commentary.

⁹⁷Jaegers (2002).

Obligations to protect – corporations are to adopt regulations and other measures in order to:

Internal obligations:

- adopt, disseminate and implement international human rights law standards in their business policies and codes of conduct, and adopt internal guidelines for the public and for private corporations in weak governance zones, emphasising the need to respect the right to healthy environment;
- introduce ‘human rights impact assessments as part of investment and procurement decisions, including the selection of suppliers and contractors’;⁹⁸
- institute effective monitoring to ensure that the abovementioned policies are being followed, and to initiate disciplinary proceedings when they are violated;⁹⁹
- protect individuals from abusive conduct by third-parties and adopt internal complaints procedures where victims can submit allegations of violations of the right to a healthy living environment.

External obligations:

- introduce policies and procedures to evaluate and address the compliance with right to a healthy living environment within the supply chain and with contractors;
- prevent violations of the right to a healthy living environment also externally, in their supply chains and in business relationship with contractors, sub-contractors and business partners. This implies the following obligations of corporations:

Obligations to protect – corporations are to adopt regulations and other measures in order to:

Internal obligations:

- protect the health and safety of workers in their corporations and in the corporations of their contractors and business partners;

External obligations:

- protect the environment in the area in which they operate;
- ensure the safety and quality of the products that they and their business partners as well as sub-contractors produce;

Obligations to fulfil – corporations are to take active measures to ensure the availability of:

Internal obligations:

- a safe working environment not endangering the right to a healthy living environment
- a human rights policy and strategy and internal codes of conduct that address human rights challenges and includes measures to prevent and respond to human rights violations of the right to a healthy living environment

⁹⁸See the GRI (Global Reporting Initiative) Guidelines (G2), HR 2.

⁹⁹See the GRI (Global Reporting Initiative) Guidelines (G2), HR 1.

External obligations: where government services are not available (e.g. in remote areas):

- to co-operate in creating an environment where human rights, including the right to a clean living environment, are understood and respected, and not to operate or consider operating in countries where there is a 'high level of human rights violations or where legislation, governmental practice or other constraints make it imperative to address specific abuses and devise ways of promoting respect for human rights.'¹⁰⁰
- to introduce the necessary reforms to existing corporate structures or business policies. It may appear that part of the strategy could be the adoption of internal supervisory mechanisms and controls;
- to promote best practices and professionalism among employees;
- to promote and protect fundamental human rights, including the framework of the right to a healthy living environment in the wider local community.

IV. Conclusion

Referring back to the introduction of this paper, it seems that a plausible argument can be made that corporations operating in the area of the Ogoniland have a responsibility to respect, protect and fulfil the right to a healthy living environment of the individuals and the indigenous community of the Ogoni peoples as a whole. In this way, corporations should seriously consider the implications of their business activities on the daily lives of local communities. This paper has attempted to conceptualise a normative approach towards corporate responsibility for the right to a healthy living environment. It has argued that the corporate human rights obligations under the right to a healthy living environment derive primarily from national legal orders, second from the international level and third from unilateral voluntary commitments by the corporations themselves. Even though legislation on corporate responsibility concerning the right to a healthy living environment already exists in many countries at a national level, and sometimes even at the regional level, disparities in definition and scope and a piecemeal approach in implementation are problematic for an effective investigation and enforcement. As suggested above, national legal orders regulate corporate responsibility for human rights in a number of laws, which makes it difficult to have a clear and transparent landscape of the obligations of corporations in a particular legal order. This problem can, however, be met by introducing a uniform national law which would clearly identify the obligations and responsibilities of corporations in relation to human rights. Further, this paper has attempted to show that states and corporations have a responsibility to respect, protect and fulfil the right to a healthy living environment. All in all, these inherently interconnected sections have attempted to explain the concept of corporate responsibility for the right to a healthy living environment.

¹⁰⁰ Amnesty International (1998), see an Introduction.

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